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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No 78-1652

MARTIN HAROLD HODDER, ROWENA E. ROBERTS, KEVIN DONOVAN, LORRETTA DONOVAN, E. GARDNER PRIME, VALERIE PRIME, NATHANIEL ERIC HODDER,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA,

Repondents,

and

FLORIDA POWER & LIGHT COMPANY,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit affirming decisions of the Nuclear Regulatory Commission granting a license to construct a nuclear power plant on Hutchinson Island to the Florida Power and Light Company.

OPINIONS BELOW

The judgment and memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit in *Hodder v. Nuclear Regulatory Commission*, Nos. 76-1709 and 78-1149, together with an earlier order of that court granting petitioners interim relief are set forth in the Appendix to the Petition. The opinion is not officially reported.

The following opinions and orders of the Nuclear Regulatory Commission's Atomic Safety and Licensing Appeal Board ("Appeal Board") and Atomic Safety and Licensing Board ("Licensing Board") in *Florida Power and Light Company* (St. Lucie No. 2) are set out in a Separate Appendix: *Pre-Hearing Conference Order* #3, LPB-74-55, 8 AEC 117 (1974); *Partial Initial Decision—Environmental and Site Suitability*, LPB-75-5, 1 NRC 101 (1975); *Supplement to Board's Partial Initial Decision*, LPB-75-25, 1 NRC 463 (1975); *Decision*, ALAB-335, 3 NRC 830 (1976); *Initial Decision*, LPB-77-27, 5 NRC 1038 (1977); *Memorandum and Order*, ALAB-415, 5 NRC 1435 (1977); and *Decision*, ALAB-435, 6 NRC 541 (1977).

JURISDICTION

The judgment of the Court of Appeals was entered on December 26, 1978. The Court denied petitioners' request for rehearing or rehearing *en banc* by an order entered on January 30, 1979. The jurisdiction of this Court in invoked under 28 U.S.C. § 1254 and 28 U.S.C. § 2350.

QUESTIONS PRESENTED FOR REVIEW

1. Can the National Environmental Policy Act of 1969[1] be construed to permit the Nuclear Regulatory Commission to refuse to consider the environmental risks posed by possible major nuclear accidents in licensing proceedings before it has determined through agency action that the generic probability of such accidents is sufficiently remote to excuse individual consideration of the risks?
2. Can the Administrative Procedure Act[2] be construed to authorize the Nuclear Regulatory Commission to apply an "interim policy" expressed in a rule proposed for comment in 1971 but never since adopted as the sole basis for conditioning an intervenor's right to be heard with respect to the environmental risks posed by major nuclear accidents in proceedings to determine whether a populous island is a suitable site for a nuclear power facility?
3. Did the Court of Appeals err in deciding that an agency's "interim policy" expressed in a proposed rule which had never been adopted had become a "well established rule" and the "reasoned and consistent view" of the agency solely by virtue of the agency's repeated application of the policy in licensing proceedings in which the agency had consistently refused to consider the basis or rationale for the proposed rule?

[1]National Environmental Policy Act of 1969, Public Law No. 91-190, 42 U.S.C. §§ 4321 *et seq.* (App. 7a).

STATUTES INVOLVED

The case involves the statutes listed below, the relevant portions of wich are set forth in the Appendix to this petition. (App. pp. 7a, *et seq.*).

1. The Administrative Procedure Act, 5 U.S.C. §§ 551, 553, 701, 702, and 706.
2. The National Environmental Policy Act of 1969, 42 U.S.C. § 4331, *et seq.*

[2]Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (App. 9a).

STATEMENT OF THE CASE

A. Introduction

The incident at Three Mile Island was what the Nuclear Regulatory Commission ("NRC" or "Commission") calls a class 9 nuclear accident. For the past seven years, the Commission has refused to consider class 9 accidents in determining the environmental impact of licensing the construction or operation of nuclear facilities. This petition asks the Court to grant review to consider a very narrow but critically important question — whether the Commission's refusal to give any consideration to the environmental impact of class 9 accidents can be reconciled with the requirements of the National Environmental Policy Act of 1969 and the Administrative Procedure Act.

B. Nature of the Problem and Regulatory Background

The National Environmental Policy Act of 1969 ("NEPA") requires that the Commission give "appropriate consideration" to the environmental impact of its major actions. Licensing the construction and operation of a nuclear facility constitutes such an action. The Administrative Procedure Act ("APA") provides the procedural framework within which the consideration must be given and the Commission's decisions may be reviewed. The Commission's standards and procedures for considering environmental issues in licensing proceedings are codified in its rules.[3] These rules do not, however, deal with the consideration to be given possible major nuclear accidents.

As the Commission has recognized, determining the weight to be given possible major nuclear accidents under NEPA requires a determination of two issues — what is the probability that such an accident will occur and, if it does, what are the probable and potential consequences. Each of these determinations raises both generic issues common to all licensing decisions and specific issues particular to the decision for any individual site. For example, given the

[3] *See.* 10 CFR, Parts 50, 51, and 100.

existing state of the technological art, the probability that a particular kind of accident will occur may be determinable as generic decision. This determination may, however, require modification based upon construction or operating problems peculiar to a particular site. So too, the consequences: the probable radiation emission likely to occur as a result of a particular type of accident may be determinable as a generic matter, but the distribution of that radiation and its effect upon the environment can only be determined in relation to population, meteorological, and ecological characteristics of the particular site.

Against this background the Atomic Energy Commission ("AEC" or "Commission") proposed in 1971 to consider the issues posed by major nuclear accidents through the exercise of its rulemaking power. On December 1, 1971, the AEC published a Notice of Proposed Rule Making to amend its regulations by providing for "Consideration of Accidents in Implementation of the National Environmental Policy Act of 1969."[4] The Commission proposed to divide nuclear accidents into nine classes. For classes 1 through 8, the Commission proposed criteria which applicants should use and which the Commission would apply in considering the environmental impact of possible accidents in those classes. The accidents in classes 1 through 8 included all accidents the Commission had foreseen and provided for in its design and engineering standards. Class 9 was to include all accidents which exceeded the design standards and operating procedures required by the Commission.[5]

Under the proposed rule, applicants were not required to discuss and the Commission would not consider Class 9 ac-

[4] Proposed Annex A to Appendix D of 10 CFR, Part 50, 36 Fed. Reg. 22851 (Dec. 1, 1971) (Separate App.). On July 15, 1974, the Commission revoked Appendix D but preserved the proposed Annex A as a proposed rule amending 10 CFR, Part 51. 39 Fed. Reg. 26279 (July 18, 1974); *see also.* USNRC Regulatory Guide 4.2, Rev. 2 at p. 7 (NUREG-0099, July 1976).

[5] *Id.*

cidents in environmental reviews. The rationale proposed for his decision was:

> "The occurrences in Class 9 involve sequences of postulated successive failures more severe than those postulated for the design basis for protective systems and engineered safety features. Their consequences could be severe. However, the probability of their occurrence is so small that their environmental risk is extremely low . . . . *For these reasons it is not necessary to discuss such events in applicants environmental reports.*"[6]

The AEC did not and the NRC has not adopted the proposed rule; it remains open today. For the past seven years, however, both agencies have applied the unadopted rule in licensing proceedings as in "interim policy" and have refused to consider the environmental impact of possible class 9 accidents unless and until an intervenor can carry the burden of rebutting the proposed rule and show that there is a "reasonable possibility that a class 9 accident will occur."[7] It is the agency's rote application in licensing proceedings of this unadopted interim policy as the basis for refusing itself to bear its NEPA burden to consider the environmental risk and as the basis for imposing a "threshold test" procedural rule upon intervenor's right to be heard on the issue that gives rise to the questions presented by this petition.

These questions take on special importance in light of the Commission's subsequent actions with respect to the problem. The AEC did not in 1971 offer or claim that it had any basis upon which the probability of class 9 accidents

[6] *Id.* Emphasis supplied.

[7] *Florida Power and Light Co.* (St. Lucie No. 2), Prehearing Conference Order #3, LPB-74-55, 8 AEC 117 (1974) (Separate App.). *See also, Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831 (1973).

might rationally be determined.[8] Since 1974 the NRC has had a draft report of a study it commissioned,[9] one of the purposes of which was to develop the methodology and determine the probability of occurrence and the probable consequences of various types of class 9 accidents. The study calculated the probability of one type of class 9 accident occurring based upon an assumed 100 reactors in operation in 1980 at one in two hundred per year, although it then went on to argue that the probability of anyone being seriously injured was highly remote.[10] In

[8] *See generally*, D.F. Ford, *A History of Federal Nuclear Safety Assessments: From Wash.-740 Through The Reactor Safety Study* (Union of Concerned Scientists, 1977) [Ford]. The AEC apparently relied initially on a 1957 study, "Theoretical Possibilities & Consequences of Major Accidents in Large Nuclear Power Plants," Wash.-740 (1957). By 1962, the Commission had recognized that it did not have the "technology to assign quantitative numbers to all significant factors relative to safety or to predict with surety probabilities of malfunctioning engineering features of plant design." A.E.C. Technical Information Doc. 14844 (1962). *See also*, "The Safety of Nuclear Power Reactors (Light Water Cooled) and Related Facilities," Wash.-1250, p. 8-4 (1973).

In 1972, S.H. Hanauer, technical advisor to the AEC director, was asked to comment upon a proposed MIT study to resolve the problem. His notes reflect his judgment of the Commission's then position. "5. What are we going to do for a year in licensing facilities while this study is perking along? $64 for the answer — wave arms and talk loud." S.H. Hanauer, "Notes on MIT Study Proposal" quoted in Ford, *supra*, at pp. 49-50.

[9] "Reactor Safety Study: An Assessment of Accident in U.S. Commercial Nuclear Power Plants," Wash.-1400 (1975) [the Rasmussen Study]. The study was issued in draft form in August, 1974, and in final form October, 1975. The study consists of 14 volumes including a 12 page Executive Summary.

[10] Rasmussen Study, Executive Summary, § 2.11, p. 8. The risk assessment portion of the study, treated the *consequences* of a major accident, placed the odds of 1000 members of the public being killed in a reactor accident at something like one in a billion, which coincides with the probability that a meteor would strike a U.S. population center and cause 1000 fatalities. (*Id.*, Executive Summary 2.15, p. 9). The Commission repudiated this part of the study on January 18, 1979. *See* note 12, *infra*.

response to questions raised challenging the methodology employed to reach an optimistic assesment of the risk, the AEC issued an Interim Statement of General Policy stating that the draft study's analysis of the probable consequences of a major accident would not be used in licensing proceedings.[11] Recently, the NRC repudiated the risk assessment portion of the study.[12]

The events at Three Mile Island dramatically corroborated the Commission's belated concern. Indeed, the ground for concern is such that the Commission is now reported to be considering closure of all nuclear facilities constructed by the manufacturer of the plant at Three Mile Island.[13] But NEPA was intended to compel consideration

[11]A.E.C. "Protection Against Accidents in Nuclear Power Reactors: Interim General Statement of Policy," 31 Fed. Reg. 39064 (August 21, 1974).

[12]N.R.C. "Statement of Risk Assessment and Reactor Safety Report (Wash.-1400) in Light of the Risk Assessment Review Group Report" (January 18, 1979). The Commission ordered that the Statement be included with all copies of the Rasmussen Study distributed. The repudiation was based upon the "Risk Assessment Review Group Report to the Nuclear Regulatory Commission" (NUREG/CR-0400) (September, 1978) [the "Lewis Report"]. The Lewis Report recognized the value of the Rasmussen Report methodologically, but criticized the Executive Summary, the procedure followed in producing the final study, and the calculations in the body of the study. The Lewis Report described some of the inadequacies of the present reactor siting criteria:

> There has been consideration of use of the Reactor Safety Study itself, its refinements, and conclusions based on these in revising the basis of part of the regulatory process. *One example considered in this connection is the analysis required by 10 CFR 100 (Reactor Site Criteria), whose philosophical basis is partly a view that reactor core meltdown should be no more probable than 10^{-6} per reactor year, because any meltdown could be catastrophic. The conclusions of the Reactor Safety Study disagree with both the probability of such an event and its effects, and so a revision of the site criteria themselves is suggested. No specific steps in this direction have yet been taken.*

Lewis Report, at p. 44. *Emphasis supplied.*

[13]The Miami Herald, Sec. A, p. 1, (Tuesday, April 24, 1979).

of these risks *before* the site was selected and the plant constructed.

C. Proceedings Before the Commission

On May 14, 1973, Florida Power and Light Company ("FPL") filed an application for a license to construct a nuclear power plant at St. Lucie on Hutchinson Island, Florida, just eight miles south of the city of Fort Pierce on a 22 mile long barrier island along the east coast. The Environmental Report FPL submitted with its application did not include any analysis of the environmental impact of class 9 accidents at the proposed facility and the AEC's Final Environmental Statement reported that the environmental costs of class 9 accidents were "not considered."[14]

In their statement of contentions, petitioners contended that the Commission must consider the environmental consequences of class 9 accidents in the hearings on FPL's application. In its final prehearing order, the Licensing Board ruled that because intervenors had made "no showing of a reasonable possibility of class 9 accident [sic] at St. Lucie . . . an issue relating to class 9 is denied."[15] The Licensing Board thus ruled before the hearing began that petitioners would not be permitted to introduce or question evidence with respect to class 9 accidents. As a result, the Licensing Board did not permit any evidence or testimony which was relevant only to that issue. The Atomic Licensing and Safety Appeal Board ("Appeal Board") affirmed this decision.[16]

The principal contentions the Licensing Board did consider in its environmental siting review focused on a close question: whether the environmental costs entailed in constructing the nuclear facility on Hutchinson Island (which

[14]Final Environmental Statement, St. Lucie Plant, Unit 2, Florida Power and Light Company, Docket No. 50-389, May, 1974, Table 7.1, p. 7-2. Both merely repeated the rationale set forth in the proposed rule as the basis for non-consideration.

[15]Prehearing Conference Order #3, *supra* (Separate App.)

[16]*Decision*, ALAB-335, *supra* (Separate App.).

was within a tourist area that had experienced and was anticipating substantial population growth; which was near the ocean shore where it would be vulnerable to foreseeable major hurricane activity and where any substantial radiation emissions might effect the marine as well as the land based eco-systems; and which was to be a site where evacuation in the event of an accident would be constricted by the fact that the island had only limited access to the mainland) outweighed the benefits of that site in comparison with available alternative inland sites located in low population areas.[17] Underlying the Licensing Board's decision to grant the license was FPL's agreement to increase the safety features for the proposed facility to reduce the risk of radiation resulting from class 1 through class 8 accidents to a projected level which under Commission rules would permit reduction of the required "low population zone" from a five to a one mile radius from the facility.[18] The Licensing Board's findings and decision illustrate the type of site specific factors that might tip a cost benefit analysis if the environmental impact of class 9 accidents were considered to have any weight.

On June 29, 1976, the Appeal Board affirmed the Licensing Board's partial initial decision granting a Limited Work Authorization for the St. Lucie facility. After further remand hearings, on October 7, 1977, the Appeal Board affirmed the Licensing Board's decision to grant FPL a construction permit. Both decisions became final orders of the Commission.

Petitioners sought review in the United States Court of Appeals for the District of Columbia. The Court of Appeals had jurisdiction under 28 U.S.C. §2342 and 42 U.S.C. § 2239.

[17] Prehearing Conference Order #3, *supra*.

[18] Partial Initial Decision, *supra*, (1 NRC at 136-39) (Separate App.)

D. Proceedings Before the Court of Appeals

In petitioners' appeal from the initial decision to grant the Limited Work Authorization, the Court of Appeals stayed the permit pending completion of the alternate site review ordered by the Appeal Board and ordered that appeal be held in abeyance pending completion of those proceedings. (App. p. 5a) The Court subsequently consolidated that appeal with petitioners' appeal from the Commission's final decision to license construction.

On December 26, 1978, the Court of Appeals affirmed the decisions of the Commission, rejecting petitioners' claim that the Commission erred as a matter of law in failing to consider or permit consideration of class 9 accidents. In a brief unsigned memorandum opinion, the Court ruled:

> Petitioners' claim on the accidents issue has been foreclosed by previous decisions in this court. It is well settled that, because of the extreme improbability of their occurrence, the NRC need not consider the environmental effects of so-called "Class 9" accidents. *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 798-800 (D.C. Cir. 1975). It is true that *Carolina* was decided prior to the publication in final draft of the Reactor Safety Study, WASH-1400 (1975), that found a probability of Class 9 accidents significantly greater than had been indicated by the previous study, WASH-740 (1957). *Carolina*, however, has been reaffirmed by decisions of this court subsequent to the publication of the 1975 study. *Lloyd Harbor Study Group, Inc. v. NRC*, No. 73-2266 (D.C.Cir., Nov. 29, 1978); *Aeschliman v. NRC*, 547 F.2d 622, 632 n.21 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Vermont Yankee Nuclear Power Corp. v. N.R.D.C.* 435 U.S. 519 (1978). *These decisions*

> *accord with the reasoned and consistent view of the NRC. Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831 (1973).

(App. 4a; *emphasis added.*).

In *Shoreham*, however, the Commission did not consider any evidence concerning class 9. It was relying upon the finding of improbability *suggested* as a rationale in its *proposed* rule and applying the proposed rule as "interim policy." It remains clear that the Commission has not yet made, or articulated a basis for, a considered decision with respect to the probability such accidents might occur. Petitioners' submit that seven years is too long to permit the continued application of an unadopted rule to exclude consideration in adjudicatory proceedings.

E. Effect of Agency Action.

NEPA mandates that agencies consider the environmental impact of proposed actions as part of the decision making process. The AEC could have considered and the NRC could consider the environmental consequences of major nuclear accidents in informal rule making proceedings. If, after considering the record developed in those proceedings, the agency reached a reasoned decision that the possibility of their occurrence was so remote that the environmental risk was extremely low, either agency could have promulgated a rule which would have made it unnecessary to consider their environmental impact in licensing proceedings.

In the alternative, the AEC could have considered and the NRC could consider the probability in individual adjudicatory licensing proceedings and decide on the record developed there what, if any, additional consideration of the environmental risk attributable to major nuclear accidents was appropriate. Over time, the precedents

established by these decisions might lay a foundation for a policy to be applied in subsequent adjudications.

By following either of these procedures, the agency would have been fulfilling the Congressional mandate to consider environmental risks and would have been exercising its discretion and making its decisions in accordance with procedures mandated in the APA. Either type of agency action would have been susceptible and subject to judicial review.

The agency here has made a decision in fact without formally considering the environmental impact of major nuclear accidents and without adhering to either procedure. The proposed rule does not represent an agency action and cannot be reviewed until a final rule is promulgated. But, since the rule was proposed, the agency has used it in each licensing adjudication as the basis not to consider major nuclear accidents as part of its environmental review.[19] Thus has the agency avoided its responsibility to consider and make a decision.

REASONS FOR GRANTING REVIEW

The Commission has effectively made a decision. It has decided that the probability that a major nuclear accident will occur is so remote that the environmental risk from such an accident does not warrant consideration in proceedings to determine whether and where nuclear facilities should be built. The Commission may be correct

[19]The agency has, of course, stated in each adjudicatory proceeding that, if intervenors can show "a reasonable possibility" of a Class 9 accident at a particular site, it will then consider the environmental risk. A "threshold rule" which shifts the NEPA burden from the agency to the intervenor would be appropriate if, but only if, the agency itself had properly considered and decided on an adequate record that the generic probability of such an accident was too remote to warrant further consideration. Congress placed the initial burden upon the agency, not those who appear before it.

and may have substantial evidence to justify such a decision. The Commission may be wrong or it may have no basis upon which such a decision could be made. But whatever the decision, it is apparent that the question is of critical importance to a proper balance between our power needs and our environmental concerns.

Petitioners concede that the decision in the first instance must be made by the Commission. Petitioners urge that a decision of that kind and magnitude cannot be made in a manner which bars public input in the decision-making process, which avoid public disclosure of its basis, and which precludes judicial review of the final decision. By using a policy expressed in an unadopted (and hence unreviewable) rule as the basis for foreclosing consideration of the issue in licensing proceedings, this is precisely what the agency has done.[20] By using the repeated application of this policy in licensing proceedings as the basis for deciding that rule was well established, the Court has sanctioned this decision-making process and in effect insulated it from review.

The application of the unadopted policy in these proceedings and the Court of Appeals decision sanctioning that procedure are inconsistent with the procedural and with the substantive guidelines established by this Court's

[20]Although it has not formally promulgated a rule embodying its decision not to consider class 9 accidents, the Commission has in every meaningful respect acted as though what it chooses to characterize as a "policy to provide interim guidance" was a formal decision. In any meanful sense the Agency has adopted a "rule" as that term is defined in the APA, 5 U.S.C. § 551(4) (". . . an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . .") without conforming to the formalities required by 5 U.S.C. § 553. As such the rule is invalid.

In any event, the Commission's action in repeatedly refusing to consider class 9 accidents after it has repudiated the very basis upon which its initial policy was based suggests the agency's licensing decision here should be found to be "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with Law." 5 U.S.C. § 706(2)(A).

prior decisions. The Commission's refusal to consider the environmental impact of major nuclear accidents in these proceedings is hard to reconcile with this Court's decisions interpreting NEPA, especially in view of the fact the Commission has refused to consider their probability in its pending rulemaking proceedings. *See, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Calvert Cliff's Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

The Commission's failure to make the determination upon which it justifies its present refusal through some form of reviewable agency proceedings is hard to reconcile with this Court's decisions construing the APA. *Compare, Shoreham, supra,* with *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943) (establishment of policy in adjudicatory proceedings without full consideration); *contrast, S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947) (establishment of policy after full adjudicatory consideration). *See also, N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (application of policy established by adjudication to subsequent proceedings), esp. *dissent* (Harlan, J.) 394 U.S. at 780-784 (limits of precedent as establishing policy).

But it seems clear, in any event, that this petition presents two serious questions of federal law of great importance which this Court should resolve:

> Whether NEPA imposes an obligation upon the Commission to make a determination of the probability that various kinds of major nuclear accidents will occur before it can discount the environmental risk to the point where the consequences are entitled to no weight in the environmental review process; and
>
> whether the Commission may rely upon an unadopted policy and precedents applying it as establishing a rule which shifts the burden of justifying such consideration from the Commission to intervenors who appear before it.

Few issues could be of greater public concern than the question of risk to the human environment posed by our expanding reliance upon nuclear power. Recent events have justly shaken the public's confidence in the procedure by which the Commission has discharged its responsibilities.[21] At a minimum, the Commission's treatment of these concerns can hardly be said to be consistent with the "full disclosure" purpose underlying NEPA. *See, Silva v. Lynn*, 482 F.2d 1282, 1284-85 (1st Cir. 1973); *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 348 (8th Cir. 1972). The Court should take this opportunity to clarify the procedures the Commission must follow in making determinations of such critical importance.

Quite simply, petitioners find it hard to reconcile the Court of Appeals decision with the teachings of this Court so recently set forth in *Vermont Yankee, supra. Vermont Yankee* presented the question what procedures was the Commission required to employ in considering the environmental impact of nuclear fuel reprocessing and waste disposal. This Court accepted the Court of Appeals ruling that the Commission could give the consideration required by NEPA either in generic rulemaking proceedings or in individual licensing proceedings, but overruled that court's decision, holding that the court should not have imposed upon the commission's decision-making process procedures in excess of those required by the APA. In *Vermont Yankee* the issue was whether the courts could require more; here the issue is whether the courts can permit less.

In *Vermont Yankee*, the Court recognized that the Commission had appropriately determined that NEPA required that it consider the environmental impact of "spent fuel." The Court's concern was whether the Court of Appeals

[21]The risks have been well described and the public concern reflected in the popular press. *See*, "A Nuclear Nightmare," *Time*, April 9, 1979, pp. 8-20; "Crisis in the World of Nuclear Power," *Life*, May, 1979, pp. 22-30; "Nuclear Accident," *Newsweek*, April 9, 1979, pp. 24-39.

had improperly substituted its judgment for that of the Commission by imposing procedures in addition to those required by the APA and in determining that the consideration given by the Commission was inadequate.

This petition presents a case in which the Commission has refused to consider a class of major nuclear accidents in either rulemaking or licensing proceedings. The environmental relevance of such accidents to the licensing of nuclear power plants is far more direct and is closer in both space and time than the environmental effects likely to result from the handling of spent fuel over the coming centuries. In *Vermont Yankee*, the Commission had considered and determined through agency action that existing technology was adequate for present containment and that future technology was likely to be adequate for long term containment. Here, the Commission is still developing the methodology to determine the probability that such a major accident will occur and, if it does, its impact upon the environment. It has not yet acted upon the question through any agency process, whether by way of rulemaking or licensing proceedings.

In *Vermont Yankee*, a unanimous court reiterated that:

> The Administrative Procedure Act . . . was not only "a new, basic and comprehensive regulation of procedures in many agencies," . . . but also a legislative enactment which settled "long-continued debates and hard-fought contentions, and enacts a formula upon which opposing social forces have come to rest."

(435 U.S. at 523, citations omitted).

Petitioners respectfully suggest that this Court should now consider whether the balance struck by Congress must not be honored in both ways. If the courts cannot require more process than is due under the Act, in fairness they should not permit the agency to give less.[22]

[22]In the companion case decided with *Vermont Yankee* (*Consumers Power Co. v. Aeschliman*), the Court also considered whether the Com-

The fact that the Commission has not adopted a rule and articulated "a concise general statement of [its] basis and purpose" as required by the APA, 5 U.S.C. § 553(c), reflects and has caused a great deal of confusion. The confusion wrought by the agency is demonstrated not only by their failure to adopt any rule on catastrophic accidents for 22 years and the continuing failure to use any of their technical scientific studies as a basis for licensing decisions, but also by the difficulties various courts of appeal have had in attempting to divine the agency's bases for its failure to consider class 9 accidents. The courts of appeal for various circuits have relied upon diverse extrinsic evidence ranging from the outmoded WASH-740 (1957) study to *Time* magazine articles in their judicial reviews upholding the Commission policy on class 9. *See e.g., Carolina Environmental Study Group v. United States,* 510 F.2d 796 (D.C. Cir. 1975); *Porter County Izaak Walton League of America, Inc. v. AEC,* 553 F.2d 1011 (7th Cir. 1976).

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mission could require intervenors to satisfy a threshold burden before it was obligated to consider a previously unrecognized but possibly material alternative in assessing the environmental impact of siting a nuclear plant. There the issue was whether the Commission erred in declining to consider energy conservation as an alternative to a proposed nuclear facility in 1972. In view of the fact that the Council on Environmental Quality had not suggested this to be relevant until 1973 and had not adopted a rule until 1974, the Court found the Commission reasonably required intervenors to make a threshold showing of materiality and the agency's refusal to consider was not significant. In sharp contrast here, the danger posed by major nuclear accidents has been a central concern since the dawn of the nuclear age. NEPA simply mandated that the Commission consider the environmental impact as well as regulating safety in licensing nuclear facilities. It would be hard to conceive an issue more clearly within the Commission's NEPA mandate than consideration of the environmental risk associated with possible accidents at nuclear facilities. Although petitioners concede that the Commission might impose a threshold test if it had properly determined that the probability of a Class 9 accident was extremely remote, they submit that nothing in *Vermont Yankee* can be read as authorizing the Commission to transfer the burden of making that initial determination to an intervenor.

Finally, contrary to the finding of the Court of Appeals, the Commission has not been "consistent" in its handling of the class 9 issue and its current position is unclear. Evidence of conflicting attitudes on the part of the Commission itself may be seen by contrasting the arguments counsel for the Commission used in arguing against consideration of class 9 to the Court of Appeals in the instant case, with those advanced almost contemporaneously before the Appeal Board in *Offshore Power Systems,* (Manufacturing License for Floating Nuclear Power Plants) NRC Docket No. STN 50-437, 8 NRC 194 (1978). Commission lawyers urged the Appeal Board in *OPS* that "the old proposed annex does not forbid discussion of Class 9 accident consequences in all cases, and that Class 9 accident consequences may be discussed even for some land based plants without running afoul of the annex" at the same time, they were suggesting to the Court of Appeals in this case that the refusal to consider class 9 accidents was in "accord with the *reasoned and consistent* view of the NRC" established by *Carolina* and *Shoreham.*

Even before the Court of Appeals ruled that this was the Commission's "reasoned and consistent view", the Appeal Board had articulated a new view. On August 21, 1978 the Appeal Board ruled:

> "It is one thing to hold the staff to clearly articulated, reiterated policy guidance that the Commission has chosen to let stand. It is quite another to extend that policy to situations not considered at its adoption. And doing so is particularly inappropriate where that "guidance" is a proposed Atomic Energy Commission regulation — proffered but not adopted in 1971 — and allowed to languish ever since. We therefore cannot share our dissenting colleague's faith in the annex's vitality for seasons and circumstances

never contemplated." ALAB 489, 8 NRC at 220 (1978)[23]

Petitioners agree.

CONCLUSION

It is perhaps appropriate to reiterate that petitioners do not seek to overturn the carefully crafted structure for federal regulation of the nuclear industry or to limit the agency's discretion. They do, however, seek to focus attention on an abuse of agency discretion which has foreclosed the public, the parties here, and Commission's own Licensing Board and Appeal Board from considering leading scientific data presently available on the probabilities of class 9 accidents.

Petitioners submit the issues raised by this petition present important questions of federal law this Court should address and resolve.[24] Recent events lend urgency and great practical significance to these issues. The consideration to be given to possible major accidents in selecting sites for nuclear power plants and the requirements under which that consideration is to be given are urgent

[23]It is gratifying to petitioners that, after five years in litigaton, the Appeal Board view now coincides with their own.

[24]The Court of Appeals disposition of this appeal by a memorandum opinion seems inappropriate because it deprives this Court of a full explanation of that court's decision. In may be that the court misconstrued the scope of the *Vermont Yankee* decision. In any event, in view of the procedure followed by the court below and in view of the fact that the Commission presently has under consideration a decision repudiating the unadopted policy, *Offshore Power Systems, supra,* petitioners suggest that the Court grant the petition and consider vacating the judgment below and remanding the proceedings to the Court of Appeals for further consideration.

matters of national concern. For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1709 September Term, 1978

Martin Harold Hodder, et al.,
Petitioners

v.

U.S. Nuclear Regulatory Commission
and United States of America,
Respondents

Florida Power & Light Company,
Intervenor

And Consolidated Case No. 78-1149

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by petitioners' Hodder, et al., having been transmitted to the full Court and no judge having requested a vote with respect thereto, and certain letters, dated January 22, 1979, submitted by petitioners and by respondents, likewise having been circulated to the full Court, it is

ORDER, by the Court, that petitioners' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:
/s/ George A. Fisher
GEORGE A. FISHER
Clerk

United States Court of Appeals
for the District of Columbia Circuit
FILED JAN 30 1979
GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1709 September Term, 1978

Martin Harold Hodder, et al., Petitioners

v.

U.S. Nuclear Regulatory Commission and United States of America, Respondents

Florida Power & Light Company, Intervenor

78-1149

Martin Harold Hodder, et al., Petitioners

v.

U.S. Nuclear Regulatory Commission and United States of America, Respondents

Florida Power and Light Co., Intervenor

PETITIONS FOR REVIEW OF ORDERS OF THE NUCLEAR REGULATORY COMMISSION

Before: McGOWAN and WILKEY, Circuit Judges, and FLANNERY,* United States District Judge for the District of Columbia

JUDGMENT

These causes came on to be heard on petitions for review of orders of the Nuclear Regulatory Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the orders of the Nuclear Regulatory Commission under review

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

herein are hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

MEMORANDUM

Petitioners seek review of two decisions of the Nuclear Regulatory Commission authorizing intervenor Florida Power and Light Company to construct an 850 megawatt nuclear power reactor at Hutchinson Island, Florida. In No. 76-1709, petitioners challenge an NRC Atomic Safety and Licensing Appeal Board decision affirming a decision of the Atomic Safety and Licensing Board permitting limited construction work at the site over petitioners' objections that population density and distribution were not in accordance with the NRC's own regulations, and that the NRC's failure to examine the environmental effects of major nuclear accidents constituted a violation of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* (1976). In No. 78-1149, challenge is brought to an Appeal Board decision that the NRC's examination and consideration of alternative sites for the proposed project complied with NEPA.

Petitioners' claim on the regulation issue is that Hutchinson Island itself should be considered a "population center" within the meaning of 10 C.F.R. part 100. We disagree. The notion of a population "center" implies some centralized grouping or concentration of residents, not the type of dispersed populace as is present on Hutchinson Island. *See New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Commission*, Nos. 77-1219, *et al.*, slip op. at 7 (1st Cir. August 22, 1978).

Petitioners' claim on the accidents issue has been foreclosed by previous decision in this court. It is well settled that, because of the extreme improbability of their occurrence, the NRC need not consider the environmental effects of so-called "Class 9" accidents. *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 798-800 (D.C. Cir. 1975). It is true that *Carolina* was decided prior to the publication in final draft of the Reactor Safety Study, WASH-1400 (1975), that found a probability of Class 9 accidents significantly greater than had been indicated by the previous study, WASH-740 (1957). *Carolina*, however, has been reaffirmed by decisions of this court subsequent to the publication of the 1975 study. *Lloyd Harbor Study Group, Inc. v. NRC*, No. 73-2266 (D.C. Cir., Nov. 29, 1978); *Aeschliman v. NRC*, 547 F.2d 622, 632 n.21 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Vermont Yankee Nuclear Power Corp., v. NRDC*, 435 U.S. 519 (1978). These decisions accord with the reasoned and consistent view of the NRC. *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831 (1973).

On remand from a previous decision of the Appeal Board, ALAB-355, 3 NRC 830 (June 20, 1976), the NRC's staff conducted an investigation of six actual alternative sites, including Hutchinson Island. The Appeal Board concluded that this analysis gave adequate consideration to possible alternative sites. *Florida Light and Power Co.* (St. Lucie Nuclear Power Project, Unit No. 2), 5 NRC 1038, 1050 (1977). We affirm this conclusion, finding it supported by substantial evidence in the record taken as a whole. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1709 September Term, 1976

Martin Harold Hodder, et al.,
Petitioners

v.

U.S. Nuclear Regulatory Commission
and United States of America,
Respondents

Florida Power & Light Company
Intervenor

Before: Wright and McGowan, Circuit Judges

ORDER

On consideration of petitioners' motion for summary reversal and injunctive or other relief, and of the oppositions thereto, it is

ORDERED by the Court that the aforesaid motion for summary reversal is denied, and, it is

FURTHER ORDERED by the Court that any Limited Work Authorizations authorized pursuant to the Partial Initial Decision which is the subject of review in this case, is stayed in light of the Atomic Safety and Licensing Appeal Board's decision that alternative sites were not adequately considered by the Atomic Safety and Licensing Board.* This order is without prejudice to further proceedings

*We agree with the concerns expressed in Mr. Salzman's dissent and find it anomalous that construction can be taking place at one site while the Atomic Safety and Licensing Board has been directed by the Appeals Board to hold further proceedings concerning alternative sites.

before this court concerning the continuance of this stay once the remanded proceedings are concluded, and, it is

FURTHER ORDERED by the Court that the appeal in this case be held in abeyance pending the completion of the proceedings before the Atomic Safety and Licensing Board concerning alternative sites.

Per Curiam

United States Court of Appeals
for the District of Columbia Circuit
FILED OCT 21 1976

GEORGE A. FISHER
Clerk

APPENDIX D

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Public Law 91-190, Approved January 1, 1970

Purpose

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Title I
Declaration of National Environmental Policy

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resouce exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to overall welfare and developmeat of man, declares that is is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall —

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

* * *

FEDERAL ADMINISTRATIVE PROCEDURE ACT

60 Stat. 237 (1946), as amended by 80 Stat. 378 (1966), 81 Stat. 54 (1967), 88 Stat. 1561 (1974)

TITLE 5 — UNITED STATES CODE

Chapter 5 — Administrative Procedure

Subchapter II — Administrative Procedure

Sec.

551. Definitions.

* * *

553. Rule making.

* * *

§551. Definitions

For the purpose of this subchapter —

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include —

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title —

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or property seeking and entitled as of right to be admitted as a party, in an agency proceeding; and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefor or of

valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency —

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withhholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency —

(A) grant of money, assistance, license, authority; exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

* * *

§553. Rule making

(a) This section applies, accordingly to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the

rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * *

Chapter 7 — Judicial Review

Sec.

701. Application; definitions.
702. Right of review.
* * *
704. Actions reviewable.
* * *
706. Scope of review.

§701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that —

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter —

(1) "agency" means each authority of the Government

of the United States, whether or not it is within or subject to review by another agency, but does not include —

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

* * *

§704. Actions reviewable

Agency action made reviewable by statute and final agency action for which their is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order,

for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

* * *

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonable delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.